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No. 85-1415

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARGARET ALICE WOLFENBARGER and
JOHN WOLFENBARGER,

Petitioners,

v.

STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

May, 1986

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257(3) to grant the Writ of Certiorari where the Petitioner did not specially set up and claim his Fourth Amendment issue in the Oklahoma Court of Criminal Appeals and where that Court, based upon state law, refused to consider on review arguments which were neither presented clearly or supported properly?

2. Are the Petitioner's convictions for obstructing an officer in the discharge of his duty invalid because Petitioners, who were pawn brokers, physically resisted efforts of officers to recover stolen property from their possession when the officers had with them the thief who had stolen and pawned the property?

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JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3), but, as shown below, Petitioner failed to specially set up or claim his constitutional argument in the Court below. Therefore, this Court does not have jurisdiction to issue the Writ of Certiorari.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners assert jurisdiction pursuant to 28 U.S.C. § 1257(3) which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioners were convicted of violating 21 O.S. 1981, § 540 which states in its entirety:

> § 540 Obstructing Officer
>
> Every person who willfully delays or obstructs any public officer in

> the discharge or attempt to discharge any duty of his office, is guilty of a misdemeanor.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari arising from a final judgment of the Oklahoma Court of Criminal Appeals affrirming the convictions of the Petitioners for obstructing an officer. At trial Petitioners were found guilty of this misdemeanor offense and were sentenced to six months in the county jail and fines of $500.00 each.

Statement of the Facts

Testimony at trial revealed the following facts. On December 3, 1982, Nelson Erdmann, a criminal investigator for the Comanche County District Attorney's Office, accompanied by two other law enforcement officers, went to Shady Sam's Pawn Shop in Lawton, Oklahoma to inspect and recover a camera, believed by Erdmann to have been stolen (Tr. 2-4).

The officers brought with them to the pawn shop Paul Chatham, who had been arrested for several burglaries in the county (Tr. 4). Petitioners herein, John Wolfenbarger, whose wife Margaret Wolfenbarger, a co-defendant, apparently owns the pawn shop (Tr. 78), after having been notified both over the telephone prior to the police visit, and again upon the officers' arrival, that the camera was believed by police to be stolen, handed the camera to Chatham, who then identified it as stolen (Tr. 9-9).

Thereafter, Erdman testified, he instructed Mike Thomas, a Deputy Investigator with the Comanche County Sheriff's Office, to write a receipt for the camera, so that it could be taken into police custody (Tr. 10). Upon hearing this, the witness stated, John Wolfenbarger "got excited and hollered that [Erdmann] wasn't going to do that. . . and lunged for the camera." (Tr.

10). John Wolfenbarger then began walking briskly along the side of the counter, which ran along one wall of the shop, toward the front door (Tr. 11). The witness testified that when John Wolfenbarger reached the front door he attempted to put his key in the door, in order to lock the witness and his companions in the building (Tr. 11). When Erdmann then placed his hand over the keyhole to block John Wolfenbarger's effort to lock the door, John Wolfenbarger shoved Erdmann, and told him the men were not leaving the store (Tr. 12).

After warning John Wolfenbarger three times to get away from the door, Erdmann placed defendant under arrest "for interfering." (Tr. 13). A scuffle ensued, during which a plate glass window in the pawn shop was broken, but no personal injuries occurred (Tr. 13).

Michael Thomas, a Comanche County deputy sheriff, testified that as he was returning from helping Erdmann with John Wolfenbarger at the front of the store, he observed Mary Wolfenbarger, John Wolfenbarger's wife, take the camera in question from the counter where Erdmann had set it down, "open the door behind the counter, and throw [the camera] in the back" (Tr. 51). Mrs. Wolfenbarger then "blocked the door with her person and started hollering different things, something about you're not going to get the camera" (Tr. 54). After asking Mrs. Wolfenbarger to stand aside from the door "at least three times," Mrs. Wolfenbarger was also arrested (Tr. 54, 55).

Mrs. Wolfenbarger testified for the defense, on behalf of herself and her husband. Her testimony is for the most part consistent with that of the State's witnesses. In particular, Mrs. Wolfenbarger testified that she and her

husband were together behind the pawn shop counter when Erdmann, Thomas and the others came to the shop and asked to see the camera (Tr. 83). Se also admitted knowing that the men were in fact police officers when they arrived (Tr. 99). Further, Mrs. Wolfenbarger testified she overheard Chatham identify the camera as stolen. (Tr. 100). She testified that when Erdmann said they were going to confiscate the camera, her husband said, "Oh, no, you're not," and proceded toward the front of the store (Tr. 84). She also stated:

> "A. (By Mrs. Wolfenbarger): I don't deny taking the camera and putting it behind [the door], but I did not position myself in front of the door." (Tr. 103).

She further testified:

> "Q. (By Mr. Landon): Isn't it true that the incident -- that your husband's actions were to the end of not giving up the camera to the police?
>
> A. (By Mrs. Wolfenbarger): Without a court order, yes, sir." (Tr. 106).

John Wolfenbarger did not testify at trial.

SUMMARY OF THE ARGUMENT

While the Petitioners alluded to the Fourth Amendment to the United States Constitution in their motion for new trial and Petition in Error to the Oklahoma Court of Criminal Appeals, they did not actually make any Fourth Amendment argument in the Court of Criminal Appeals. The Court of Criminal Appeals refused to consider on review their arguments because these arguments were neither presented clearly nor supported properly. This principle of Oklahoma state law serves as an adequate and independent state ground for the decision below. The Petitioners did not present, and the Court of Criminal Appeals did not decide, the constitutional issue set out in the Petition herein.

Petitioner John Wolfenbarger attempted to lock officers in his pawn shop and Petitioner Margaret Wolfenbarger attempted to prevent officers from recovering a stolen camera by physicaly barring a doorway and they were arrested and ultimately convicted of obstructing a public officer in the discharge of his duties. The officers in question had gone to the Petitioner's pawn shop with a thief then in custody to recover a stolen camera which the thief and a confederate had pawned there. Officers had a right to be in the pawn shop and to inspect the property and, having ample probable cause, were entitled to seize it as stolen property and evidence of a crime.

PROPOSITION I

THIS COURT LACKS JURISDICTION TO ISSUE THE WRIT OF CERTIORARI.

Petitioner seeks jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). That section confers jurisdiction on this

Court to issue a Writ of Certiorari to the Oklahoma Court of Criminal Appeals when any title, right, privilege or immunity especially set up or claimed under the Constitution of the United States. However, the Petitioners did not make their Fourth Amendment claim in the Oklahoma Court of Criminal Appeals and that Court, citing Hawkes v. State, 644 P.2d 111 (Okl. Cr. 1982), refused to consider on review Petitioner's arguments because they were neither presented clearly nor supported properly.

Petitioners did in fact allude to the Fourth Amendment in their Motion for New Trial and Petition in Error to the Oklahoma Court of Criminal Appeals. However, in their briefs before the Oklahoma Court of Criminal Appeals the Petitioners only cited the Fourth Amendment in one proposition heading. Their argument relied upon Oklahoma statutes and constitutional provisions and

not any principles based upon the Fourth Amendment to the United States Constitution. For instance, the Petitioners did not cite Coolidge v. New Hampshire, 403 U.S. 443 (1971), to the Court of Criminal Appeals. Nor did they cite Mapp v. Ohio, 367 U.S. 643 (1961), to that Court. Petitioners simply did not make below the arguments made before this Court and the Oklahoma Court of Criminal Appeals ruled on no constitutional question.

This Court noted in Cousins v. Wigoda, 419 U.S. 477, 486-87 (1975), that where a state court had failed to consider a defense of race judicata because it was not properly asserted in the state system, that ruling constituted an independent state bar to federal jurisdiction over that claim. We suggest a similar result here because the Petitioners did not frame a Fourth Amendment issue in the Court of Criminal

Appeals and that Court refused to consider Petitioners' arguments because they were not clearly presented or supported properly. Likewise, this Court in Parker v. North Carolina, 397 U.S. 790, 798 (1970), refused to consider the criminal defendant's challenge to the racial composition of the grand jury indicting him because the state courts had refused to consider that claim for the defendant's failure to timely object to the grand jury. Also, in Cardinale v. Louisiana, 394 U.S. 437, 438 (1969), this Court stated that it had no jurisdiction unless a federal question was raised and decided below. In the same case, the Court noted that an issue may be blocked by an adequate state ground of decision. Id. 394 U.S. at 439.

Therefore, we believe this Court lacks jurisdiction to grant the writ requested by Petitioner.

PROPOSITION II

PETITIONERS WERE PROPERLY CONVICTED OF OBSTRUCTING AN OFFICER.

This is not a Fourth Amendment case. As noted above, no Fourth Amendment claim was specially set up or raised before the Court of Criminal Appeals. The issue might more properly be stated as whether or not pawn brokers may lock law enforcement officers in the pawn shop or physically bar the door to prevent the officers from recovering stolen property found there. Petitioners were convicted of obstructing an officer in violation o 21 O.S. 1981, § 540 which states in its entirety:

> Every person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, is guilty of a misdemeanor.

As noted in the Petition herein, every pawn broker who having received any goods which have been stolen refuses or omits to exhibit them upon demand to a

peace officer is guilty of a felony. 21 O.S. 1981, § 1092. Thus, the Petitioners had a duty to exhibit their merchandise on demand to the officers. The officers obviously had a right to be in the pawn shop, which was open to the general public, to inspect for stolen merchandise. In the present case, the police brought with them the thief who had confessed to stealing and pawning the camera in question. When the police attempted to take the stolen camera, after giving Petitioners a receipt, John Wolfenbarger tried to lock the officers in the pawn shop while Margaret Wolfenbarger threw the camera in another room and physically barred the door to the officers. Clearly, the Petitioners delayed or obstructed the officers in the discharge of their duty to recover stolen property.

In Texas v. Brown, 460 U.S. 730, 742-43 (1983), this Court noted that the

seizure in items in plain view constituted no invasion of privacy and was presumptively reasonable assuming that officers had probable cause to associate the items with criminal activity. Further, the Court went on to note that probable cause was information sufficient to warrant a man of reasonable caution in the belief that the item was stolen or useful as evidence of a crime. The officers in the present case obviously met that standard. They had with them the thief who admitted stealing and pawning the camera. Surely people of reasonable caution would believe that the camera was stolen based upon the admission of the thief who stole it.

Further, in Payton v. New York, 445 U.S. 573, 586-87 (1980), this Court noted that weapons or contraband found in a public place may be seized without warrant. Also, in Colorado v. Bannister, 449 U.S. 1, 4 (1980), the Court approved

the warrantless seizure of some chrome lug nuts found in plain view inside an automobile previously and legitimately stopped. Surely the officers in the present case could legitimately seize the stolen camera.

Indeed, even Coolidge v. New Hampshire, 403 U.S. 443, 472 (1971), relied upon by Petitioners, excluded from its analysis "contraband, stolen goods or objects dangerous in themselves." That case involved vacuum sweeping taken from an automobile seized pursuant to an invalid warrant and not merchandise which was obviously and uncontestably itself stolen property and evidence of a crime. We respectfully suggest that the Petitioners were properly arrested and convicted for obstructing officers in the performance of their duty to recover stolen property.

CONCLUSION

Based upon the foregoing arguments and authorities, we respectfully suggest this Court has no jurisdiction to issue a Writ of Certiorari and should not do so because Petitioners' convictions do not violate any constitutional provision.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL
DIVISION

112 State Capitol Building
Oklahoma City, OK 73105
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